INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Discussion	5

CITATIONS

O'Neill v. *United States*, 32 F. (2d) 313	6
Sawyer v. *United States*, 10 F. (2d) 416	6
Unger v. *United States*, 65 F. (2d) 946	6, 7
United States v. *Barry*, 67 F. (2d) 763	6
United States v. *LePage*, 59 F. (4d) 165	7

40783—34

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 742

BERTHA MEYER SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 91–102) is reported in 67 F. (2d) 412.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 6, 1933. (R. 102.) A petition for rehearing was denied December 11, 1933. (R. 103.) The petition for writ of certiorari was

filed January 25, 1934. Although she does not so state, the petitioner presumably invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a war risk insurance contract issued December 3, 1917, on the application of the insured, had lapsed for nonpayment of premiums when the insured died on June 30, 1921, the facts being that although the insured in his application for insurance authorized monthly deductions from his service pay for the payment of the premiums, he did not renew this authorization at the beginning of his second and third enlistments on March 18, 1918, and September 16, 1919; and that during these enlistments he received his full pay without deduction for the premiums, and did not himself pay the premiums.

STATEMENT

The complaint in this case, which was filed in the District Court for the District of ~~Washington~~ Oregon, alleged that a contract of war-risk term insurance in the principal amount of $10,000 was issued by the United States to one Elias Melvin Zimmerman on or about December 3, 1917, and that this contract remained in force by reason of an authorization for deduction of premiums from service pay until Zimmerman's death while in the service on June

30, 1921. (R. 7–9.) The plaintiff (petitioner herein) was the mother and designated beneficiary of the insured. (R. 7, 43, 53.)

A jury was waived by stipulation in open court (R. 42), and it was stipulated that the only matter in controversy was whether the insurance was in force on June 30, 1921, when the insured died. (R. 57.) The pertinent facts, as stipulated by the parties (R. 53–57) and as found by the District Court (R. 43–48), are as follows:

Zimmerman, the insured, served three successive enlistments in the United States Navy from March 18, 1914, to March 17, 1918; from March 18, 1918, to September 15, 1919; and from September 16, 1919, until June 30, 1921, the date of his death. (R. 43, 54.) He was the holder of a continuous service certificate. (R. 44, 54.)

In the application for war risk insurance, executed by Zimmerman on December 3, 1917, there was contained the following provision (R. 45, 55):

> I authorize the necessary monthly deductions from my pay, or if insufficient, from any deposits with the United States in payment of the premiums as they become due, unless they be otherwise paid.

The premiums due on the insurance were deducted from Zimmerman's service pay to and including the month of March, 1918, but beginning with his second enlistment, on March 18, 1918, no further deductions were made from his service pay

nor did he execute any further authorizations for deductions or make any payment of premiums himself. (R. 46, 55.) Service pay was due Zimmerman for each and every day of the period from March 18, 1914, to June 30, 1921, the date of his death. (R. 45, 55.)

At the time of discharge from his first enlistment on March 17, 1918, and again on September 15, 1919, when his second enlistment terminated, all money then due Zimmerman was paid to him. The pay due Zimmerman at the time of his death on June 30, 1921, was paid to the petitioner, his mother. (R. 46, 55.)

The only evidence introduced in addition to that stipulated was the deposition of Lieutenant Dismukes, who stated that he had access to the records relating to the enlisted men in the Navy, and that he found upon a search of those records that Zimmerman had never made any allotment for war risk insurance premiums after his original application for insurance, although twelve members of the crew of the U.S.S. *Conestoga,* on which he was serving at the time of his death, had executed such allotments. (R. 57–58.)

The District Court entered judgment for the petitioner. (R. 71.) While it rendered no opinion, its conclusions of law (R. 48) indicate that it considered that the authorization for deduction of premiums from service pay, contained in the original application for insurance executed December 3, 1917, remained in effect during the subsequent

enlistments, and therefore continued the insurance in force, although the insured executed no further authorizations for deductions from service pay for payment of premiums, no deductions were actually made, and no premiums paid by the insured himself.

On appeal the judgment for the petitioner was reversed by the Circuit Court of Appeals for the Ninth Circuit, that court holding that the authorization for deduction of premiums from service pay which was executed on December 3, 1917, ceased to be effective on the expiration of the enlistment in which it was executed (March 17, 1918), and further that (R. 101):

> the insured, by accepting the money which the appellee now claims should have been appropriated to the payment of the premium of the war risk insurance, in effect consented to an abandonment of his policy for his acceptance of the money which belonged to the government, if the insurance was in effect, cannot be considered otherwise than as a consent to the abandonment of the contract of insurance on his part and an agreement that the policy should be considered as lapsed.

It therefore held that the insurance was not in force when the insured died on June 30, 1921.

DISCUSSION

The decision rendered by the Circuit Court of Appeals in the instant case is in accord with that reached by the Circuit Court of Appeals for the

Sixth Circuit in *United States* v. *Barry*, 67 F. (2d) 763, and with the decision of the Circuit Court of Appeals for the Second Circuit in *Sawyer* v. *United States*, 10 F. (2d) 416, but is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Unger* v. *United States*, 65 F. (2d) 946. See also *O'Neill* v. *United States*, 32 F. (2d) 313 (D.Mass.).

In the *Unger* case, *supra*, the insured enlisted in the Army on May 28, 1919, was honorably discharged June 17, 1919, reenlisted on July 8, 1919, and was again honorably discharged July 7, 1920. During the period of his first enlistment he applied for and obtained a contract of war risk insurance. Pursuant to authorization contained in the application for insurance, premiums were deducted from the insured's service pay during the entire period of his first enlistment. Upon reenlistment premiums were not deducted or otherwise paid. The Circuit Court of Appeals for the Tenth Circuit held that the authorization for deduction of premiums from service pay executed during the first enlistment remained in effect during the second enlistment and that, as the soldier was entitled to continuous service pay, from which deductions could have been made for the premiums, they should be treated as paid even though deductions were not in fact made.

The Government did not apply for certiorari in the *Unger* case, for the reason, among others, that

as the case was remanded for a new trial without the court passing upon the sufficiency of the evidence to support the judgment, the question decided might not arise upon a second trial in view of an allegation in the complaint that the insured was permanently and totally incapacitated prior to his first discharge.

Petitioner also alleges that the decision of the Circuit Court of Appeals in the instant case is in conflict with that of the Circuit Court of Appeals for the First Circuit in the case of *United States* v. *LePage*, 59 F. (2d) 165, but we do not think that that case is in point. The question there decided related to an application for war risk insurance made on behalf of the soldier by a third party on the last day of the statutory period within which applications might be received. The application was ratified by the soldier after the expiration of the statutory period, and the opinion was concerned primarily with the question whether the application was timely executed. That case did not present the question whether an authorization for deduction of premiums from service pay executed during one enlistment is effective during a subsequent enlistment.

Because we regard the *Unger* decision as in conflict with the decision of the Circuit Court of Appeals herein, we do not oppose the granting of the petition. Further, it cannot be said that the question is not of importance as there are now

pending in the various District Courts about 9,000 war risk insurance cases and, according to information furnished by the Veterans' Administration, the continuation of insurance contracts in subsequent enlistments is involved in approximately five percent of the pending suits. There is, therefore, a reasonable probability that the question herein involved may arise in a considerable number of cases.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
WILL G. BEARDSLEE,
WILBUR C. PICKETT,
RANDOLPH C. SHAW,
Special Assistants to the Attorney General.
W. MARVIN SMITH,
Attorney.

FEBRUARY, 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934